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IN THE

Supreme Court of the United States

October Term, 1954

No. 405

In the Matter of

LEE ROY MURCHISON

In the Matter of

JOHN WHITE

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN AND APPENDIX

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INDEX

	Page
REFERENCE TO OFFICIAL REPORTS	2
JURISDICTION	2
a. Date of judgment and time of entry	2
b. Motion as to re-hearing and time of entry	2
c. Statutory provisions conferring jurisdiction	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL PROVISIONS, AND STATUTES INVOLVED	3
CONCISE STATEMENT OF FACTS	4
ISSUES RAISED IN STATE COURT	8
ARGUMENT	11
Question No. 1	11
Question No. 2	12
Question No. 3	14
Question No. 4	15
SUMMARY	16
APPENDIX	18
Sections 28.943-28.944; Michigan Statute Annotated; Callaghan's Pocket Supplement, 92-103	18-25
Art. IV. of the Michigan Constitution of 1908: Division of the Powers of Government	25
Fourteenth Amendment of the Constitution of the United States	25
Order to Show Cause	26-28
Opinion of Recorder's Court Re: Murchison	28-49

Page

Opinion of Supreme Court, State of Michigan
Re: Murchison 49-53
Re: White 54-62
Stipulation, Supreme Court, State of Michigan
Re: Murchison and White 62, 63
Application For Leave to Appeal
Re: Murchison 64-67
Re: White 68-71

TABLE OF CASES

Coblentz v. State, 164 Md. 558, 166 A. 45 13
Hurtado v. Louisiana, 110 U.S. 480, 23 L. Ed. 682 .. 13
In Re Slattery, 310 Mich. 458, 17 N.W. (2nd) 249 12
In Re Oliver, 333 U.S. 257, 92 L. Ed. 682 .....11, 13, 15, 16
Kennard v. Louisiana, 92 U.S. 480, 23 L. Ed. 478 12
Moore v. Dempsey, 261 U.S. 85, 67 L. Ed. 543 14
Prentiss v. Atl. Coast Line, 211 U.S. 210, 53 L. Ed. 150 13
State v. Lawler, 221 Wis. 432 13

CONSTITUTIONAL PROVISIONS AND STATUTES

14th Amendment of Constitution of the United States 5
Art. IV of the Constitution of the State of Michigan .. 5, 12
Michigan Statutes Annotated, 1953, Cumulative Supplement, Paragraphs 28.943, 28.944 .....5, 7, 15
Public Act No. 276, 1951, State of Michigan 14

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

The two cases of Lee Roy Murchison and John White are combined for the purposes of this petition seeking certiorari in that the two causes were combined for the purposes of the issues raised in the Supreme Court of Michigan, and the questions raised in the two causes are identical questions or questions very closely related.

John White and Lee Roy Murchison herein pray that a writ of certiorari issue to review respective judgments of the Supreme Court of the State of Michigan entered on the 6th day of July, 1954.

REFERENCE TO OFFICIAL REPORTS

Review is sought of the opinion of Judge John P. O'Hara, Judge of the Recorder's Court for the City of Detroit, State of Michigan, and of the cases of In re White, 340 Mich 140, and In re Murchison, 340 Mich 151. (The opinions in the respective cases to be set forth in the Appendix).

JURISDICTION

a. The opinions and judgments of the Supreme Court of Michigan affirming the judgments of the Recorder's Court of the State of Michigan a to both petitioners were entered on the 6th day of July, 1954. (R. p. 190)

b. On the 9th day of July, 1954, a motion for re-hearing and petition for stay of proceedings were filed. (Record p. 194). As of the same day, July 9, 1954, the petition for stay of proceedings was granted and the motion for a re-hearing was subsequently denied (Record p. 194). After the denial of the motion for a re-hearing, a petition for stay of proceedings pending application for leave to file for a Writ of Certiorari with the United States Supreme Court was granted allowing the filing of a petition for certiorari within thirty (30) days from the 14th day of September, 1954.

c. The jurisdiction of this court is invoked to review the judgments of the Supreme Court of the State of Michigan in the respective cases by Writ of Certiorari under the terms of Title 28, United States Code Annotated, Section 1257 (3). Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

> ". . . (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immu-

nity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercises under, the United States. June 28, 1948, c. 646, 62 Stat. 929."

QUESTIONS PRESENTED

1. Is the one man grand jury statute constitutional?

2. Can the Judge at one and the same time be a one man grand jury and still have the inherent power to adjudicate one in contempt while acting in a so-called judicial capacity without violating the concept of due process of law as assured by the 14th Amendment of the Constitution of the United States?

3. Does the interpretation given to Section 28.944 of the Michigan Statute by the Supreme Court of Michigan amount to a denial to the petitioners of their constitutional rights of due process?

4. Was not the interpretation of the Supreme Court of Michigan of Section 28.943, Michigan Statute Annotated, to the effect that "a witness was entitled to have legal counsel before or after being subpoenaed, and prior to his being called as a witness, or at such other times in the discretion of the grand juror" not only an expressed violation of the terms of the Michigan Statute but a violation as well of the constitutional rights of the petitioners?

CONSTITUTIONAL PROVISIONS, AND STATUTES INVOLVED

Sections 28.943-28.946; Mich. Stat. Anno.; Callaghan's Pocket Supplement, pages 92-103. (In appendix hereto.)

Art. IV of the Michigan Constitution of 1908: Division of the Powers of Government. (In appendix hereto.)

Fourteenth Amendment of the Constitution of the United States. (In appendix hereto.)

A CONCISE STATEMENT OF FACTS

In the Matter of John White

On March 16, 1954, Judge John P. O'Hara, one of the Judges of Recorder's Court for the City of Detroit, County of Wayne, State of Michigan, was selected and appointed to conduct a one man grand jury under Section 28.943, Michigan Statutes Annotated, and following sections appurtenant thereto, to investigate police corruption in connection with gambling. He entered upon his duties the following day and the investigation commenced immediately.

The petitioner herein, John White was subpoenaed to testify before Judge John P. O'Hara, grand juror, on May 21, 1954, and in response to said subpoena did appear before Judge John P. O'Hara sitting as a one man grand juror on May 21, 1954.

On examination before Judge John P. O'Hara, the petitioner White stated his name and on being asked other questions declined to answer and did refuse to answer any questions "unless my attorney is here with me at all times, from the beginning to end."

On May 24, 1954, an order to show cause was entered requiring John White to show cause why he should not be punished for contempt for refusal to answer any and all material questions put to him as a witness before the grand jury. The order to show cause was returnable May 28, 1954 at which time petitioner herein did appear in response to said order returnable before John P. O'Hara as Recorder's Judge. By stipulation the transcript of testimony given by White on May 21, 1954, before the grand jury was admitted in evidence. The essence of that transcript of testimony is to the effect that White refused to answer unless accompanied by counsel as hereinbefore set forth. Counsel for the respondent entered an objection to the proceedings before Judge O'Hara for the reasons the Act in question was unconstitutional and that Judge O'Hara as Recorder's Judge was disqualified from hearing a contempt of this nature and based these objections upon the

14th Amendment of the Constitution and Article IV of the Michigan Constitution, Michigan Statutes Annotated, 1953 Cumulative Supplement, Paragraph 28.944 which provides in part:

> ". . . The Judge conducting an inquiry under Section 3 of this Act shall be disqualified from acting as the examining magistrate in connection with the hearing on any complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under Section 5 hereof, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena."

Judge O'Hara overruled the objections and found the respondent guilty of contempt and sentenced him to be confined in and/or at Detroit House of Correction for a period of Ninety (90) days and that he pay a fine of Two Hundred Fifty ($250.00) Dollars. Counsel for petitioner requested a stay of proceedings until application for leave to appeal to the Supreme Court for the State of Michigan was granted. Judge O'Hara granted a stay of proceedings and upon applying for leave to appeal the same was granted.

The application for leave to appeal posed the following questions: (1) Is the Statute in question unconstitutional because it is contrary to the due process clause of the Fourteenth Amendment, Art. IV of the Michigan Constitution? (2) Is a Judge for the Recorder's Court under C.L.S. 1952, Paragraph 767.3, M.S.A. Cum. Supp., Paragraph 28.943, disqualified by the provisions of C.L.S., 1952, Paragraph 767.4, M.S.A. Cum. Supp. Paragraph 28.944, for citing a witness for contempt and thereafter hearing the contempt proceedings himself where the alleged contempt rose in the course of a grand jury investigation in the presence of him as a grand juror? (3) Is counsel for a witness called before a one man grand jury entitled under C.L.S. 1952, Paragraph 767.3 M.S.A., Cum.

Supp. Paragraph 28.943 to be present in the grand jury room during the testimony of this client? The Michigan Supreme Court on July 6, 1954, affirmed the lower Court. (4) In assuming the duties of a grand jury, did Judge O'Hara continue to be vested with judicial functions and/or safeguards while acting in an administrative capacity? (5) Does the legislature have the authority to impose upon the judiciary duties that are not judicial?

The petitioner immediately filed a motion for a rehearing with the Supreme Court for the State of Michigan, and the petitioner was released on bail in the amount of Three Thousand ($3,000.00) Dollars by the Court pending a decision on the motion for rehearing. That on the 8th day of September, 1954, the Court denied the motion for rehearing. That following the denial of the motion for rehearing the petitioner White made application for a stay of proceedings with the Court pending his application to the Supreme Court of the United States of America for leave to file a Writ of Certiorari to review the proceedings hereinbefore set forth.

On the 14th day of September, 1954, the Court granted a stay of proceedings pending application for Writ of Certiorari in the Supreme Court of the United States conditioned that said application be filed within thirty (30) days from the 14th day of September, and the petitioner was released on bond in the sum of Three Thousand ($3,000.00) Dollars.

In the Matter of Lee Roy Murchison

That the petitioner, Lee Roy Murchison, was subpoenaed to testify before Judge John P. O'Hara, grand juror, and in response to such subpoena did appear on that date before Judge John P. O'Hara sitting as a one man grand jury.

On examination before Judge John P. O'Hara, the petitioner, Murchison, did testify with respect to visits made by him to the residence of one Edward Stephens. The

petitioner denied in secret session ever having visited the residence of Edward Stephens and was contradicted by two police officers. The other police officer, to wit, a Lieutenant of the Police Department and an Inspector, testified that they had seen Murchison visiting the home of Edward Stephens at 945 Josephat, Detroit, Michigan and introduced a purported picture of Murchison on the front porch of that address.

On May 24, 1954, Judge O'Hara acting as a one man grand jury issued an order to show cause directed to the petitioner requiring him to show cause why he should not be punished "for criminal contempt of this Court" for false swearing. This order to show cause was returnable on a day certain, and beginning Monday, May 10, 1954 and continuing through Wednesday, May 14, 1954, the petitioner did appear in response to said order returnable before Judge O'Hara. Counsel for petitioner entered an objection to the proceedings before Judge O'Hara for the reasons that the Statute was unconstitutional and that Judge O'Hara as Recorder's Judge was disqualified from hearing a contempt of this nature and based his objection upon Michigan Statutes Annotated 1953 Cumulative Supplement, Paragraph 28.944 which provides in part:

> ". . . The Judge conducting an inquiry under Section 3 of this Act shall be disqualified from acting as the examining magistrate in connection with the hearing on any complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under Section 5 hereof, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena."

Judge O'Hara overruled the objection and found the respondent guilty of contempt and sentenced him to be confined in the County Jail of Wayne County for a period of Sixty (60) days. Counsel for petitioner requested a stay of proceedings until application for leave to appeal

to the Supreme Court for the State of Michigan was granted. Judge O'Hara granted a stay of proceedings and upon applying for leave to appeal the same was granted.

The application for appeal posed a number of questions among which were the following: (1) Is the Statute in question unconstitutional because it is contrary to the due process clause of the Fourteenth Amendment, Art. IV of the Michigan Constitution? (2) Was Judge O'Hara sitting as a one man grand jury under the pertinent sections of the Statute disqualified by the provisions of the Statute for citing a witness for contempt and thereafter hearing the contempt proceedings himself where the alleged contempt laws in the course of a grand jury investigation in the presence of him as a grand jury? (3) In assuming the duties of a grand jury, did Judge O'Hara continue to be vested with judicial functions and/or safe guards while acting in an administrative capacity? (4) Does the legislature have the authority to impose upon the judiciary duties that are not judicial?

On July 6, 1954, the Supreme Court affirmed the Lower Court. That the petitioner immediately filed a motion for rehearing with the Court, and was released on bail in the amount of Three Thousand ($3,000.00) Dollars, pending a decision on a motion for rehearing.

On the 8th day of September the Court denied the motion for rehearing. That following the denial of the motion for rehearing the petitioner White made application to the Supreme Court of the United States of America for leave to file a Writ of Certiorari to review the proceedings hereinbefore set forth.

ISSUES RAISED IN STATE COURT

The very question of constitutionality of the so-called one man jury was raised in both of the above referred to matters, and various motions as hereinafter set forth were made at respective stages in order to bring into focus

the constitutionality of the so-called one man grand jury act. For the sake of expediency inasmuch as the two matters were consolidated, we will hereinafter set forth the times and manners of raising the issues in the respective cases, just as is hereinbefore set forth in the Concise Statement of Facts.

In Re White

On the 18th day of May, 1954, upon the issuance of the order to show cause why the petitioner White should not be punished for criminal contempt, the petitioner did appear on the 21st day of May, 1954 as required by the order to show cause. (Record p. 50). Thereupon petitioner was called to the stand before Judge John P. O'Hara. An objection to the proceedings was entered on behalf of the petitioner White. Over objections of counsel to the petitioner being called as a witness, he was nevertheless called and examined by Judge John P. O'Hara and the Prosecutor, Joseph Rachid. (R. P. 65, 69 and 72). Again objection was interposed by counsel for the petitioner specifically on the ground that he was entitled to counsel at all times. This objection was overruled by the Court and the matter was continued. (R. P. 82). Aaign an objection was made to Judge O'Hara continuing the contempt hearing, and request was made to have same assigned to another Judge in the same court. This objection was overruled by the Court and the matter continued. The matter was continued by the Court until Friday, May 28, 1954 (Record p. 86). Again Motions to dismiss were made because under the Statute the Judge sitting as a one man grand jury could not hear contempts except in certain instances. That the one man grand jury deprived petitioner of his liberty under the due process of law clause of the 14th Amendment of the Constitution of the United States; That the one man grand jury deprived the petitioner, who was called before it to testify, of the right to have counsel, in violation of the Constitution of the United States. All of these motions were denied. (Record p. 105)

In Re Murchison

That on the 6th day of May 1,954, Judge John P. O'Hara, as a one man grand jury issued an order to show cause requiring the petitioner Murchison to show cause why he should not be punished for criminal contempt of this Court because he had testified falsely before him. (Record p. 53). In response to the order to show cause, petitioner Murchison did appear in response to the order to show cause. The motion to dismiss the entire proceedings was made at the conclusion of the hearing for the reason that respondent was denied equal protection of the law under the due process clause of the 14th Amendment of the Constitution of the United States, giving committing functionary the entire discretion as to the scope and content of the record on appeal; and further that he disqualified himself from trying the contempt proceeding and referred same to the presiding Judge. These motions were denied. (Record pp. 173-176). A motion to dismiss was again made because the act, to wit, the One Man Grand Jury Act, violates the said due process clause. (Record p. 178).

The motions to dismiss in both instances and the reasons hereinbefore set forth in both instances in effect attack the entire One Man Grand Jury system upon the basis of a separation of powers, and that all proceedings are in violation of the petitioners' rights under the due process clause of the 14th Amendment of the Constitution of the United States. Both matters, by stipulation and by order of the Supreme Court of the State of Michigan, were consolidated on June 9, 1954 (Record p. 150). The same issues raised by motions in the lower court were submitted to the Supreme Court of the State of Michigan upon appeal therefrom by way of application for leave to appeal (App. P. ...). The application for leave to appeal was filed and granted (Record p. 150) (App. P. ..). On the 15th day of June, 1954, both cases were argued in the Supreme Court of Michigan and submitted, urging the same Federal and Constitutional questions hereinbefore set forth (Record p. 151).

REASONS FOR GRANTING THIS WRIT OF CERTIORARI

ARGUMENT

1. We here address ourselves by way of concise argument to each of the respective questions posed, urging each as a reason for the allowance of Writs of Certiorari. The question of the constitutionality of the Grand Jury Statute in Michigan has previously been before this Court but has never been expressly passed upon. In this connection we call attention to the fact that in the case of *Re Oliver*, 333 U. S. 257, 92 L Ed 682, the necessity of this Court determining the constitutionality of the Michigan Grand Jury Statute is evidenced. Mr. Justice Black, in delivering the majority opinion in this case, uses the following language:

> "The petitioner does not here challenge the constitutional power of Michigan to grant traditional inquizitory grand jury power to a single Judge, and, therefore, we do not concern ourselves with that question."

In the instant case this question of the inherent unconstitutional power of Michigan to function through a one man grand jury was raised at the threshold and carried through each step of the presentations in the courts below. The constitutionality of this one man grand jury we believe to have been effectively challenged in the above cited case by the language of Mr. Justice Rutledge in his concurring opinion:

> "Michigan's one-man grand jury, as exemplified by this record, combines in a single official the historically separate powers of grand jury, committing magistrate, prosecutor, trial judge, and petit jury * * *.
>
> "This aggregation of powers and inherent concomitant denial of historic freedoms were unknown to the common law. * * * They are altogether at variance with our tradition and system of government. * * * They cannot stand the test of constitutionality * * * there is no semblance of due process * * *."

Even in the dissenting opinion of Mr. Justice Frankfurter in the cause above referred to, it is evident that the position of this Court is that the constitutionality of the one-man grand jury system in Michigan should be passed upon only when the issue has been properly raised in the Court below and such courts have had an adequate opportunity to pass upon same, and where the record shows what actually happened under this circumstance so that this Court might properly determine as to whether or not such procedure offends the due process clause of the 14th Amendment of the Constitution of the United States. It is respectfully urged that the instant case meets this requirement and affords such an opportunity to this Court.

2. In addressing ourselves to question Number Two (2), we face the interpretation of the functioning of a one-man grand jury by the Supreme Court of Michigan as enunciated in the instant casees. The Michigan Supreme Court presumably relied on the case, among other things, of *In Re Slattery*, 310 Mich 458, 17 NW (2d) 249, cited in People's Reply Brief to Respondent's Supplemental Brief. The quotation from that Reply Brief is:

> "So that there may be no further question, we hold that the Judge conducting the one-man grand jury proceedings is acting in a judicial capacity."

It is here urged that the Court can not at one and the same time function as a one man grand jury and reserve to itself the functioning of a Court so as to make possible the adjudicating of an individual as being in contempt of said court. In acting as a grand jury, it is acting in an administrative and or executive capacity. In acting as a court it is, by definition, acting in a judicial capacity. To combine these functions is in derogation of *Article IV of the Constitution of the State of Michigan.* (App. P. 25). Whenever the question has been presented as to whether a grand jury inquiry is a judicial one in the sense of exercising of judicial power, the courts have answered in

the negative. *State* v. *Lawler*, 221 Wis. 432, 267 N.W. 65, 105 A.L.R. 568; *Coblentz* v. *State*, 164 Md. 558, 166 A. 45. In order to determine whether a person or body functions as a court or in some other capacity, it is necessary to consider more than the character of the individual or actor. This Court has said in *Prentiss* v. *Atlantic Coast Line*, 211 U. S. 210, 53 L Ed. 150, that:

> "It is the nature of the final act that determines the nature of the previous inquiry."

A grand juror's final act is the issuance of a warrant. He determines no issues and makes no adjudication. The final action in the instant cases by which the petitioners are aggrieved is an adjudication of contempt which is unquestionably a judicial determination. It is anomalous to say that one individual can at one and the same time exercise both of these functions. This cannot be better demonstrated than by the use of the words of Mr. Justice Rutledge in *Re Oliver*, *supra*, which through repetitive, we here set forth:

> "Michigan's one-man grand jury, as exemplified by this record, combines in a single official the historically separate powers of grand jury, committing magistrate, prosecutor, trial judge and petit jury * * *.

Where, as here, there is the attempt on the part of the one-man grand jury to exercise the combined functions of a grand jury, a petty jury, a prosecutor, and of a trial judge, the denial to these petitioners of due process of law is emphasized. Even if the statutory allowance of a one-man grand jury be conceded as being constitutional, there can be no conceivable question but that the functioning as a one-man grand jury cannot be violative of the individuals' rights to due process of law as assured under the 14th Amendment of the Constitution of the United States. As to this fundamental proposition, this Court has spoken over a long period of years and without variance. *Kennard* v. *Louisiana*, 92 U. S. 480, 23 L. Ed. 478; *Hurtado* v.

California, 110 U. S. 516, 28 L. Ed. 232; *Moore* v. *Dempsey*, 261 U. S. 85, 67 L. Ed. 543.

3. The Michigan Statute having to do with the setting up of the one-man grand jury, reading in part from Section 28.944, sets forth as follows: (App. P. 19).

> "* * * Provided, That the judge conducting the inquiry under section 3 of this act shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or *from hearing any charge of contempt* under section 5 hereof * * *" (underscoring ours)

The foregoing is a part of *Public Act No. 276, 1951, State of Michigan*, effective September 28, 1951. We believe that there can be no question but that this was an attempt on the part of the State of Michigan to meet issues posed by this Court in its decision in the case of *Re Oliver*, *supra*. The Supreme Court of Michigan in interpreting the foregoing part of the statute in the instant case, in *Re White*, in the language of Judge Sharp held:

> "It follows that the legislature has no power to deprive a constitutional court, * * * of its power to punish for contempt committed in its presence * * *." (App. P. 60).

It seems to us apparent that the Michigan Supreme Court, in adopting this language, loses sight of the fact that the person here functioning and who is adjudicating persons in contempt on the theory of being a Court is the same individual whom the legislature was creating as a one-man grand jury, and whom, it apparently expressly intended, should not have these anommalous powers. This interpretation simply re-creates the possibility which apparently the Michigan Legislature desired to correct of giving such a basis for denial to persons situated as these petitioners of their constitutional rights of due process. Aside from it being a denial of due process per se, it is

certainly directly opposed to the underlying decision in *Re Oliver, supra*, and to the apparent corrective step undertaken by the Michigan Legislature.

4. The *Michigan Statute Annotated, section 28.943* (App. P. 18) sets forth in part as follows:

> "* * * Any person called before the grand jury shall at *all times* be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry *without being subject to a citation for contempt.*" (Underscoring ours).

It seems to us a distortion of language or an unjustified interpretation of unambigious language when the Supreme Court of Michigan, speaking through Judge Sharp in the *White* case, in interpreting the foregoing language, indicates that:

> "* * * A witness was entitled to have legal counsel before or after being subpoenaed and prior to his being called as a witness, or at such other times in the discretion of the grand jury * * *". (App. P. 61).

It is to be remembered that the adjudication of contempt in the *White* case was presumably not based upon any refusal on the part of White to testify but rather upon his refusal to testify without having the advantage of counsel. The language of the Statute here again is an apparent attempt to meet issues created by the decision of this Court in *Re Oliver, supra*, and to correct abuses which the one-man grand jury principle gave rise to. White, we respectfully submit, was exercising his constitutional rights assured him by the Constitution of the United States and expressly reiterated by the Michigan legislature in the language above quoted when he refused to answer questions without the privilege accorded him of having counsel to advise him. The extent to which the rights of the petitioners might be violated is demonstrated by the fact that the refusals were not categorical refusals but rather an

expression of unwillingness to be committed to propositions without the exercise of a right to which he was legally entitled. It is to be noted further in this connection that in each instance the petitioners were served with orders to show cause. The language of these orders is in and of itself significant and condemnatory of the practice engaged in by the one-man grand jury, who at one and the same time adjudicates for alleged contempt committed in his presence. There is no requirement to show cause why the petitioners, respectively, should not be adjudicated in contempt but rather that they should show cause why they should not be punished for the contempt already adjudicated. (App. pp. 58-60). This is essentially a trial in camera and expressly forbidden by the Constitution of the United States and as recently pointed out in *Re Oliver, supra.*

It cannot be reasonably argued that any distinction in this constitutional right can be made between a witness and a defendant, particularly when the so-called witness faces, as here, an adjudication of contempt and a penalty imposed. Particularly is this true where, as here, reliance is upon a statute, the language of which is clear. Where the language of a statute is plain and unambigious, there is no occasion for construction, and the statute must be given effect according to its plain and obvious meaning.

SUMMARY

It is respectfully urged that the one-man grand jury, peculiar to the State of Michigan, is, to say the least, inconsistent with the provision in any other jurisdiction of the United States, and we respectfully urge by its very creation gives rise to a situation which in normal functioning can hardly avoid the violation of the Constitutional rights of persons called before it. In the instant cases where this one-man grand jury undertakes to adjudicate respondents, petitioners here, in contempt, there is an attempted judicial functioning by this one-man grand jury which, by its very operation, violates the letter and spirit

of the law as laid down by the due process clause of the 14th Amendment of the Constitution of the United States. Whether the determination by this one-man grand jury be for an alleged contempt because he concludes that testimony before him is conflicting, or whether he decides that a contempt stems from an unwillingness of a respondent to give testimony without the advantage of the advice of counsel is not the controlling factor. The error rises, as the record in these cases will abundantly disclose, in the manifold capacities in which the one-man grand jury attempts to function and in the absolute impossibility of due process being had before an alleged Court who draws the indictment and cites respondents without any opportunity to be properly heard to show cause why one should not be punished for an alleged contempt which has already been factually decided by the Court.

It is respectfully urged by each of the petitioners that a writ of certiorari issue in the respective cases directed to the Supreme Court of the State of Michigan, requiring that these respective causes be reviewed by this Court and that the respective judgments herein of the said Supreme Court of Michigan be reversed.

And for such other and further relief as to this Court may seem proper.

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APPENDIX

Sections 28.943-28.944; Michigan Statute Annotated; Callaghan's Pocket Supplement, 92-103

§ 28.943 Proceedings before trial; investigation of suspected offenses by judge of court of record; inquiry; witnesses; participants in inquiry, disqualification from appointment or election.] SEC. 3. Whenever by reason of the filing of any complaint, which may be upon information and belief, • [or upon the application of the prosecuting attorney or attorney general, any judge of a court of law and of record] shall have probable cause to suspect that any crime, offense or misdemeanor • shall have been committed within his jurisdiction • [, and that any persons may be able to give any material evidence respecting such suspected crime, offense or misdemeanor, such judge in his discretion may make an order directing that an inquiry be made into the matters relating to such complaint, which order, or any amendment thereof, shall be specific to common intent of the scope of the inquiry to be conducted, and thereupon conduct such inquiry: Provided, That in any court having more than 1 judge such order and the designation of the judge to conduct the inquiry shall be made in accordance with the rules of such court. Thereupon such judge shall require such persons to attend before him as witnesses and answer such questions as such judge may require concerning any violation of law about which they may be questioned within the scope of the order;] and the proceedings to summon such [witness] and to compel [him] to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall • [not receive any compensation or remuneration other than witness fees as paid witnesses] in other criminal proceedings • [, and said witness shall not be employed in any capacity by the judge or by any person connected with such inquiry, within the scope of the said inquiry being conducted.] Whenever a subpoena shall be issued by the [judge] conducting such inquiry, commanding the appearance of a witness before such [judge] forthwith upon the

service of such subpoena, and, following the service thereof, such witness arrives at the time and place stated in such subpoena, the [judge] so issuing the same shall be [forthwith] notified of such [appearance] by the officer serving the subpoena, and it shall thereupon be the duty of such [judge forthwith] to appear and take the testimony of such witness •. [Any person called before the grand jury shall at *all times* be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt. All matters so revealed to the attorney shall be subject to the requirements of secrecy in section 4, and any revelation thereof by the attorney shall make him subject to punishment as provided in said section. No testimony shall be taken or given by any witness except in the presence of the judge.]

Any [judge,] prosecuting [attorney] or special prosecuting [attorney,] or the attorney general participating in any inquiry under this section which continues more than 30 calendar days shall thereafter be disqualified from appointment or election to any office other than one held at the time of such inquiry: Provided, That such disqualification shall not extend more than [1] year from date of termination of such inquiry, as determined by final order of said [judge] entered prior to such date. •

§ 28.944 Same; apprehension of suspected person; disqualification of investigating judge in later proceedings; removal of public officers, procedure; disclosure of information, exceptions, penalty; report of no finding of criminal guilt; limitation of period of inquiry; inability to continue inquiry, appointment of successor judge.] SEC. 4. If upon such inquiry the [judge] shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, [he] may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the [judge] having jurisdiction shall proceed with the case, matter or proceeding in like

manner as upon formal complaint: [*Provided, That the* [*judge*] *conducting the inquiry under section 3 of this act shall be disqualified from acting as the examining magistrate in connection with the hearing* • *on the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under section 5 hereof*[*, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena*] And if upon such inquiry the [judge] shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance [in] office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said [judge] shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. • [Except in cases of prosecutions for contempt or perjury against witnesses who may have been summoned before the judge conducting such inquiry, or for the purpose of determining whether the testimony of a witness examined before such judge is consistent with or different from the testimony given by such witness before a court in any subsequent proceeding, or in cases of disciplinary action against attorneys and counselors in this state,] any [judge] conducting such inquiry, any prosecuting attorney and other persons who may at the discretion of such [judge] be admitted to such inquiry, who shall while [conducting such inquiry or while]

in the services of [such judge] or after his services with [such judge] shall have been discontinued, utter or publish any statement pertaining to any information or evidence involved in any such inquiry, or who shall disclose the fact that any indictment for a felony has been found against any person not in custody or [under] recognizance, or who shall disclose that any person has been questioned or [summoned] in connection with any such inquiry, or who shall disclose or publish or cause to be published any of the proceedings of such inquiry otherwise than by issuing or executing processes prior to such indictment, or shall disclose, publish or cause to be published any comment, opinion or conclusions related thereto, shall be guilty of a misdemeanor punishable by imprisonment in the county jail not more than 1 year or by a fine of not less than $100.00 nor more than [$1,000.00] or both such fine and imprisonment in the discretion of the court, and such offense when committed by a public official shall also constitute malfeasance in office. Upon the termination of such inquiry [if] the judge shall make no presentment of crime or wrong-doing as to any person or persons whose apprehension or removal from office he has not so caused, [he] may, in his discretion, [with the consent of the person who may be named,] file with the clerk of the county in which such inquiry has been conducted, a report of no finding of criminal guilt as to any person or persons involved in such inquiry, either as witness or otherwise, whose involvement in such inquiry has become public.

[No inquiry or proceeding hereunder shall continue longer than 6 months unless extended by specific order of the said judge or his successor for an additional period not to exceed 6 months.]

In the event any [judge] conducting such inquiry shall be unable to continue therein because of physical disability, disqualification, termination of office or death, the presiding circuit judge of Michigan shall appoint a successor.

§ 28.944(1) Same; secrecy of proceedings, exceptions, penalty.] SEC. 4a. It shall be unlawful for any person, firm or corporation to possess, use, publish, or make known to any other person any testimony, exhibits or secret proceedings obtained or used in connection with any grand jury inquiry conducted prior to the effective date of this act, except in the manner specifically provided herein, and also excepting any information heretofore disclosed before any investigating committee of the Congress of the United States or any agency of the federal government. Any person violating the provisions of this section shall be guilty of a felony.

§ 28.945] Same; failure of witness to appear or answer questions; penalty. SEC. 5. Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such [judge] may require [as] material to such inquiry, shall be deemed guilty of a contempt and after a public hearing in open court and conviction of such contempt, shall be punished by a fine not exceeding [$1,000.00] or imprisonment in the county jail not exceeding [1 year] or both at the discretion of the court: Provided, That if such witness after being so sentenced shall [offer to] appear • [before such judge to purge himself of such contempt, the judge shall cause such witness to be brought before him and, after examination of such witness,] the [judge] may in [his] discretion commute or suspend the further execution of such sentence.

§ 28.945(1) Same; confidential and privileged communications.] SEC. 5a. In any inquiry authorized by this act • communications between reporters [of] newspapers or other publications and their informants • [are hereby declared to be privileged and confidential. Any communications] between attorneys and their clients, between clergymen and [the] members of their respective churches, and between physicians and their patients • [are hereby declared to be privileged and confidential when such communications were necessary to enable such attorneys, clergy-

men, or physicians to serve as such attorney, clergyman, or physician].

§ 28.946 Same: incriminating answers of witness; granting of immunity to witness, procedure, secrecy, scope.] SEC. 6. No [witness] shall upon such inquiry be required to answer any questions, [or] shall be convicted for contempt upon refusal to do so, when the answers might tend to incriminate him. [A written order granting to such witness immunity from such incrimination may be entered by said judge pursuant to a written motion by the prosecuting attorney or other duly authorized representative of the state in such proceeding, which order shall set forth verbatim the questions which such witness refused to answer. A true copy of such motion and order shall be delivered to such witness before he shall answer such questions. The order granting immunity so made shall thereafter extend to all related questions which may thereafter be put to such witness until such udge advises the witness that said immunity no longer applies. All such questions and the answers thereto shall be reduced to writing under the direction of such judge and a true copy of such transcript, duly certified by such judge, shall be delivered to such witness as soon as practicable thereafter. The provisions for secrecy provided for in section 3 hereof shall apply to all copies of such motion, order and transcript so delivered to such witness except that the witness may be privileged to disclose the same to his attorney if such witness should thereafter be prosecuted for any offense directly or indirectly growing out of any testimony given by him in such inquiry. No person required to answer such questions shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him. No such order granting immunity shall extend beyond the scope of such inquiry, nor shall it extend beyond the particular questions set forth in any such motion, order or transcript.]

§ 28.946(1) Same; sealing and filing of docket, journal, reporters' notes, transcript and other records on termination of inquiry; secrecy; availability of transcript and record to witness in subsequent proceedings; destruction of transcripts, notes and records.] SEC. 6a. On termination of any such inquiry lasting not more than 30 calendar days the docket, journal, reporters' notes, transcript and other record of such judge in such inquiry shall be sealed and filed with the clerk of the court having jurisdiction; and if lasting more than 30 calendar days shall be sealed and filed with the clerk of the supreme court of the state of Michigan, where it shall be held secretly in a separate container securely locked. Any person who shall violate the secrecy herein ordered as to such docket, journal, transcript and record shall be punished as provided in section 4 hereof. And the entire transcript and record as to any witness, and so far as material, including any grant of immunity, shall be available to such witness in connection with any appeal or other judicial proceeding where it may be relevant upon such witness filing a petition with the circuit court of the county in which he resides setting forth the proceeding for which such documents are sought and describing the portions of such transcript and record as to such witness only, which such witness requested for such appeal or proceeding; the judge of such circuit court shall issue an order upon the filing of such petition directed to the clerk of the supreme court of the state of Michigan or the clerk of the court, as the case may be, ordering such clerk to make available to such witness all such portions of the transcript and record as shall pertain to such witness and as set forth in the petition. The clerk shall immediately reseal the remaining transcript and records after compliance with such order. The petitioner shall execute to the clerk of the supreme court a receipt for such documents and such documents shall be returned to the clerk immediately upon the termination of such appeal or proceeding for which the same shall have been obtained: Pro-

vided, however, upon the petition of the prosecuting attorney of the county in which such inquiry was conducted, or any other interested person, any circuit judge, acting as such in said county, upon determining that there is no further need for preserving and retaining the same, shall enter an order providing for the referring to the supreme court, for the entry of such order or orders as a majority of the court may at any time determine, for the destruction of said transcripts, notes and records, or any part thereof: Provided further, That no such order shall be entered by such circuit judge until at least 6 years after the termination of such inquiry.

§ 28.946(2) Same; accounting of monies disbursed, filing after termination of inquiry.] SEC. 6b. Within 90 days after the termination of such inquiry, such judge shall file with the clerk of the court having jurisdiction a public accounting of all monies disbursed by him or disbursed at his direction.

ARTICLE IV OF THE MICHIGAN CONSTITUTION OF 1908 DIVISION OF THE POWERS OF GOVERNMENT

Departments of Government. SECTION 1. The powers of government are divided into three departments: The legislative, executive and judicial.

Limitations of powers of officers. SECTION 2. No person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided in this constitution.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATE OF MICHIGAN

IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

No. 79821 Miscellaneous

In the Matter of the Application of GERALD K. O'BRIEN, Prosecuting Attorney for the County of Wayne, for a Judicial Investigation into the Operations of Numbers Syndicates and the Relation of Certain Police Officers Therewith.

At a Session of said Court held in the Municipal Court Building, Detroit, Michigan, on Thursday, May 6, 1954.

PRESENT: THE HONORABLE JOHN P. O'HARA, Judge of Recorder's Court and Grand Juror.

Order to Show Cause

This court having heretofore convened in this cause in accordance with the statute in such cases made and provided, for the purpose of conducting a judicial investigation into certain crimes, offenses and misdemeanors set forth in the order of the court, it became and was a material question to this judicial inquiry whether or not certain police officers of the City of Detroit and other persons frequented or went to the residence of a known and notorious numbers operator, to-wit, one Edward Stephen, said residence being known as 945 St. Josafats Court in the City of Detroit;

That Patrolman Lee Roy Murchinson having been duly called before the court as a witness in the said judicial

inquiry on the 7th day of April, 1954, and was then and there duly sworn; that the said Patrolman Lee Roy Murchinson, contriving and intending to prevent the due course of justice, then and there as a witness in said judicial inquiry, upon his oath aforesaid, falsely, corruptly, knowingly, and wilfully, did depose and swear, among other things, in substance and to the effect as follows: that he, the said Patrolman Lee Roy Murchinson at no time in the month of March, 1954, went to the said residence of Edward Stephen, the same being 945 St. Josafats Court, that he the said Patrolman Lee Roy Murchinson at no time went to either the rear or front door at 945 St. Josafats Court; whereas, in truth and in fact the said Lee Roy Murchinson did walk to the front entrance of 945 St. Josafats Court on the 9th day of March, 1954, at approximately 8:40 A.M. and that having failed to gain entrance at the front door of said address he the said Patrolman Lee Roy Murchinson walked to the rear door where he rang the door bell.

All of which was then and there well known to the said Patrolman Lee Roy Murchinson.

It therefore appearing from the sworn testimony of Inspector Fred Heath and Lieutenant Claude Ingersoll, and the photographs taken of the said Patrolman Lee Roy Murchinson at said address on the time and date hereinabove set forth, that the said Patrolman Lee Roy Murchinson has been guilty of wilfull and corrupt perjury, which perjury has an obstructive effect upon the judicial inquiry being conducted by this court and the said Patrolman Lee Roy Murchinson obstructed the judicial function of the court by wilfully giving false answers as aforesaid, and did also tend to impair the respect for the authority of the court, all of which perjury and false answers given by the said witness aforesaid was committed during the sitting of, in the presence and view of this court and constitutes criminal contempt;

It is therefore ordered that the said Patrolman Lee Roy Murchinson appear before this court on the tenth day of May, 1954, at 10:00 o'clock in the forenoon and show cause why he should not be punished for criminal contempt of this court because of his aforesaid acts.

It is further ordered that a true copy of this order be personally served upon the said Patrolman Lee Roy Murchinson four days before the time herein prescribed for his appearance.

JOHN P. O'HARA,
Judge of the Recorder's Court

STATE OF MICHIGAN

IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

No. 79821-1 Miscellaneous

In Re: Contempt Proceedings Against LEE ROY MURCHISON

Opinion of the Court

Question Involved:

Is a Judge of the Recorder's Court for the City of Detroit sitting as a Grand Juror under Sec. 28.943 M.S.A. et seq., precluded by provisions of Sec. 28.944, M.S.A. from citing a witness for contempt and hearing the contempt proceedings himself where the alleged contempt arose in the Courts of the grand jury investigation and in the presence of the Court.

FACTS

Prior to March 15, 1954, officers of the police department of the City of Detroit observed for some time activities around premises known as 945 St. Josaphats Court, Detroit, which was the home of Edward "Indian Steve" Stephen. The observations were the result of complaints made to the police department by neighbors concerning

the numerous policemen and other individuals visiting this address.

On March 15, 1954, police officers of the City of Detroit conducted a raid upon the premises under observation and arrested a number of individuals found on the premises and seized a quantity of gambling paraphernalia, mutual bet slips, tapes, and cash found in the premises.

On March 16, 1954, as a result of the developments growing out of the observations and raid on premises at 945 St. Josaphats Court, a petition by Gerald K. O'Brien, Prosecuting Attorney for the County of Wayne, was presented to the presiding judge of the Recorder's Court. A meeting of all judges of the Recorder's Court was immediately called and the petition as well as the oral presentations of the Prosecutor, Commissioner Donald S. Leonard of the Detroit police department, and other police officers, were heard by the entire Bench. After a discussion of the allegations, a vote of the judges was taken and the petition was granted, in accordance with Rule 38 of the Recorder's Court for the City of Detroit, which reads as follows:

> "Petitions for Grand Juries shall be presented to the Presiding Judge and by him submitted to the bench for a decision as to whether the petition shall be granted and a Grand Jury called. No Grand Jury shall be called except by affirmative majority action of the bench present. The Grand Juror shall be designated by a majority of the judges present at a meeting called for that purpose."

This rule is in accordance with Sec. 28.943 M.S.A., which in part reads as follows:

> "Provided, that in any court having more than 1 judge such order and the designation of the judge to conduct the inquiry shall be made in accordance with the rules of such court."

John P. O'Hara, one of the judges of the Recorder's Court for the City of Detroit, was unanimously appointed

as the judge to conduct the inquiry, which by an order entered on March 16, 1954, was confined to police corruption in connection with gambling. On the following day he entered upon his duties and the investigation commenced immediately.

In the course of the investigation it became material to the inquiry to discover whether police officers had visited the Stephen premises at 945 St. Josephats Court, and on April 7, 1954, Lee Roy Murchison a Detroit policeman, was called as a witness before the Grand Juror. He was sworn to tell the truth, the whole truth and nothing but the truth. He was interrogated by Joseph G. Rashid, Assistant Prosecuting Attorney for the County of Wayne. Officer Murchison was asked how many times he had visited the premises at 945 St. Josaphats Court. He replied that he had never been there.

In response to a question as to how many times he went there in January of this year, he replied, "None". In reply to a question as to how many times in March of this year, he replied, "None". In reply to a question as to how many times he had been there this year, he replied, "I haven't been there." He also stated, "I wouldn't even know exactly where 945 St. Josephats would be." He was also asked if he saw a picture which showed how he went to the house, and rang the buzzer, if he would still deny it. He answered, "That is not correct because I haven't been there." In response to further questions he said positively he didn't go there in the month of March and further that he had never been there, and, "I didn't go there. It must be a case of mistaken identity."

Testimony under oath taken before the Grand Juror of Inspector Fred Heath and Lieutenant Claude Ingersoll, of the Detroit police department, positively identified Officer Murchison as a person observed by them on the porch of the Stephen house at 945 St. Josaphats Court on the 9th day of March, 1954, shortly after 8:40 A.M. Inspector Heath identified Lee Roy Murchison as the policeman he saw on

the porch on the day in question. He further testified he had known policeman Murchison in excess of five years, and that both of them at one time had been assigned to the Vice Bureau. Inspector Heath was shown a photograph of Officer Murchison which he identified and was also shown a picture taken by Lieutenant Claude Ingersoll on the morning of March 9, 1954, showing Officer Murchison standing on the porch of the Stephen residence at 945 St. Josaphats Court. Inspector Heath identified Officer Murchison as the man in the picture taken by Lieutenant Ingersoll.

Lieutenant Claude Ingersoll, of the Detroit police department was also sworn as a witness. He testified he and Inspector Heath had previously been observing what occurred at the Stephen premises and that on the morning of March 9, 1954, about 8:40 A.M., he saw Officer Murchison walk east on St. Josaphats, go to the gate, walk up on the porch of 945 St. Josaphats, and ring the front door bell. He stated that he remained on the porch for possibly two minutes, then walked to the rear of the house where he again pushed the buzzer. He remained there for about two minutes, then walked between the houses to the street where he walked west on St. Josaphats towards Hastings Street. Lieutenant Ingersoll stated that he had known Officer Murchison since 1944 or 1945, about ten years or longer, and that he had been assigned to the 13th Precinct Station where Officer Murchison worked. Lieutenant Ingersoll also testified that he took pictures with a movie camera of Officer Murchison standing on the front porch of the Stephen residence, several of which pictures were introduced into evidence and identified as Officer Marchison.

Thereafter on Thursday, May 6, 1954, Officer Lee Roy Murchison was served in court with an Order to Show Cause on Monday, May 10, 1954, before the Grand Juror why he should not be adjudged guilty of contempt of court for falsely testifying to material facts before the court. On that day, Officer Murchison appeared together with James Jackson, who entered an appearance as Officer Murchison's attorney.

Mr. Jackson objected to the proceedings for the reason that the Grand Jury had no authority to hear contempt proceedings of the nature charged in the Order to Show Cause in view of the provisions of Sec. 28.944 M.S.A. The objection was overruled, and the court proceeded to take testimony.

The witnesses were all interrogated by Joseph G. Rashid, Assistant Prosecuting Attorney for Wayne County in open court.

Bernice Gough, the court reporter who took the previous testimony of Officer Murchison, was sworn as a witness and testified to what had been stated by Officer Murchison with respect to his presence at the Stephen premises on March 9, 1954, and to the denial of Officer Murchison that he had ever been at the Stephen premises on March 9, 1954, or at any other time. Inspector Fred Heath and Lieutenant Claude Ingersoll, were also sworn and they gave testimony of their personal acquaintanceship and knowledge of Officer Murchison and his presence at the Stephen premises on March 9, 1954. Lieutenant Ingersoll also identified the photographs of Officer Murchison taken by him on March 9, 1954.

James Jackson, cross examined witnesses Gough, Heath, and Ingersoll at length. At the close of the testimony on May 10, 1954, Mr. Jackson stated that he would produce witnesses from Shrewsbury, Canada, to prove Officer Murchison was at that place on March 9, 1954. The hearing was adjourned from May 10, 1954, to May 12, 1954, to give Mr. Jackson an opportunity to present testimony on behalf of his client. On May 12, 1954, when court convened on the matter again, Mr. Jackson offered various objections to the proceedings and stated that he did not desire to offer any testimony on behalf of Officer Murchison.

Mr. Jackson was asked by the court whether he wished to present any legal argument in support of his contentions. No brief was filed on behalf of respondent Mur-

chison by Mr. Jackson and no legal argument beyond quoting the statute, Sec. 28.944 M.S.A., was presented to the court.

The contempt hearings on May 10, 1954, and May 12, 1954, were held in open court. The front door of the courtroom was opened wide so that any person desiring to enter could do so. At various times during the hearings, many attorneys and other persons were present in the courtroom, including representatives of the press.

The matter was then adjourned to Friday, May 14th, at 11:00 o'clock A.M.

Law

In approaching the legal aspects of this matter it is first necessary to determine what the nature of a Judge of the Recorder's Court, sitting as a Grand Juror, is. In what capacity does he sit; as a creature of Grand Jury law, or as a judicial personage already in existence, clothed with judicial powers? If such a Judge does undertake a Grand Jury hearing as an existing judicial body, and not as a creature of Grand Jury legislation, then the next question is what powers with respect to contempts does an existing Judge of the Recorder's Court possess?

Question Number I: Is a Grand Juror a Special Creation of the Legislature, or Is He a Judicial Person to Whom An Investigation Is Assigned by Law?

This question has been raised many times, and it is now clear that a Judge acting as a Grand Juror functions judicially, that he is a Judge in the fullest concept of the word, and not just an "inquisitor", as has been argued before, or merely an instrumentality for the detection of crime.

It is hardly necessary to go beyond one decision of this court which answers the question as fully and completely as could be desired. That is *In Re Slattery, 310 Mich. 458.* A perusal of the record and briefs filed in this matter

discloses that the character of a Grand Juror was as completely discussed and argued as in any matter where the question has arisen before the court. The voluminous briefs filed by the Respondent's attorneys and by amici curiae dealt with the question extensively, and persistently repeated that the Grand Juror was only an inquisitor. The Court said (P. 465):

> "The statutes of this state invoked in the instant case serve the same purpose as the constitutional provisions in regard to grand juries in other jurisdictions. They do not impose non-judicial duties upon the judiciary, and are in strict conformity with the Constitution of this state (1908) which in Article VII, under the heading 'judicial department' makes due provision in regard to the judicial power. In Article VII, Section 18, under the heading 'conservator of the peace' it is stated that justices of the Supreme Court, circuit judges and justices of the peace shall be conservators of the peace within their respective jurisdictions. * * *"

Quoting from *Averill* v. *Parrott, 74 Mich. 296,* the court said:

> "As such conservators, they had, when the Constitution took effect the authority to apprehend offenders against the criminal laws of the state, and to hold examinations, and commit, bind over, or hold to bail, as well as other authority exercised by conservators of the peace."

The Supreme Court said (P. 466):

> The one man grand jury proceedings, in accordance with law, were instituted in the Circuit Court for the County of Ingham. When a complaint had been filed by the attorney general it became incumbent upon the judge "as a circuit judge to make an investigation. He was neither a prosecuting attorney, policeman, or detective. He had judicial duties to perform, and he proceeded in a judicial capacity. In order to dispel any doubt as to the finding of petitioner guilty of contempt, he proceeded to act as a circuit judge in regard to

proceedings which he himself had conducted while acting as a one man grand jury."

The Court then cited twelve of its prior decisions in which the same question had been presented, and concluding, said, on page 467:

"So that there may be no further question, we hold that the judge conducting a one man grand jury proceeding is acting in a judicial capacity."

The foregoing sentence should put at rest this question in the State of Michigan. It is interesting to note that a Writ of Certiorari in the Slattery matter was denied by the Supreme Court of the United States, *325 U. S. 876; 89 L. Ed. 1939.*

Question Number II: What Are the Judicial Powers Possessed by Judges of the Recorder's Court?

The Superior Court of Detroit, hereinafter referred to was established in 1873. The Recorder's Court of the City of Detroit was created by the Charter of the City of Detroit in accordance with *Act No. 55, Chapter 6, of 1857.* It was continued by *Act 326, Local Acts, 1883, Section 11 of the 1883 Act, being Section 27.3561 M.S.A.* "Jurisdiction" reads as follows:

"The said recorder's court shall have original and exclusive jurisdiction of all prosecutions and proceedings in behalf of the people of this state, for crimes, misdemeanors, and offenses arising under the laws of this state, and committed within the corporate limits of the city of Detroit, except in cases cognizable by the police court of the city of Detroit, or by the justices of the peace of said city; and shall have power to issue all lawful writs and process, and to do all lawful acts which may be necessary and proper to carry into complete effect the powers and jurisdiction given by this act, and especially to issue all writs and process, *and to do all acts which the circuit courts of this state within their respective*

jurisdictions may, in like cases, issue and do by the laws of this state." (Emphasis supplied)

By Act 369 of the Public Acts of 1919 the powers of the Recorder's Court were supplemented and extended after referendum approval by the voters of the City of Detroit.

Under the Recorder's Court Act of 1883 jurisdiction was given to the Recorder's Court "to do all acts which circuit courts of this state within their respective jurisdictions may, in like cases, issue and do by the laws of this state."

The inherent power of Circuit Courts to cite and punish for contempts without interference from or dictation by the Legislature was established in *Langdon* v. *Wayne Circuit Judge*, 76 Mich. 358. The case involved the question whether a Circuit Judge could punish for contempt an act which was not included in the statutes then existing covering contempts. It was necessary to determine precisely whether a Circuit Court possessed inherent powers or whether those powers could be given by and taken away by the Legislature. The Supreme Court said (P. 367):

"The question of the jurisdiction of the circuit court for the county of Wayne to entertain the proceedings at all is the only one involved here.

"Jurisdiction, when applied to courts, is the power to hear and determine a cause or matter. *Courts of record in this State have inherent power to hear and determine all contempts of court which the superior courts of England had at the common law; and the statute has not undertaken to limit or prohibit their jurisdiction in the matter of contempts.* The statutes are in affirmation of the common-law power of courts to punish for contempts, and, while not attempting to curtail the power, they have regulated the mode of proceeding and prescribed what punishment may be inflicted.

"The statutes have dealt with the subject of contempts in two separate chapters. These were first

enacted in their present shape in the revision of 1846, and have "remained unchanged until the present time." (Emphasis supplied)

The Court also said (P. 371):

> "But does it follow that the court has no jurisdiction to punish, as for a contempt of court, a person who has interfered while the suit is pending, and endeavored to bring about a disagreement of the jury by bribery? Can it be said that such conduct is not calculated to defeat, impair, impede, or prejudice the rights or remedy of the party? The jurisdiction of the court does not depend upon the fact that the misconduct did actually produce such results. If the purpose was, by adaptation of the means to the end, to bring about a disagreement of the jury, such conduct was calculated to defeat or impair the rights and remedies of the party to the suit."

The inherent right of the court to punish for contempt was upheld.

The question as to the rights and powers of the Recorder's Court with respect to contempts is fully answered in *Nichols* v. *Judge of Superior Court of Grand Rapids, 130 Mich. 187.* An attorney was cited for contempt of court. A Writ of Prohibition was asked of the Supreme Court to avoid the proceedings for the reason the Superior Court had no jurisdiction of contempts. The Court went into the matter thoroughly. The Superior Court of Grand Rapids was established by the Legislature. It was not a constitutional court, one created by the Constitution itself. The Superior Court, like the Recorder's Court, was given power "to do all acts which the circuit courts of this state within their respective jurisdictions may, in like cases, issue and do by the laws of the State of Michigan." Since this language gave the powers of a Circuit Court, a Constitutional court, the Supreme Court inquired into the powers of the Circuit Court. On page 192 it said:

"The power to punish for contempt is essential to the due administration of the law, and to carry out the orders, decrees, and judgments of the court. * * *

"It follows that if the circuit courts are clothed with the power to punish for contempts, and are not limited to the cases provided for in the statute, which was enacted under the Constitution of 1835, then the respondent possesses the same power. The question, therefore, is again presented to this court, Have the circuit courts of this State the inherent power to punish for contempts, or are they subject to the control of the legislature? The question is an important one in the administration of the law. If the legislature can determine what acts shall constitute contempts in the circuit courts, it can abolish the power of such courts to punish for contempts. There is no middle ground; either the courts have the absolute control, under the Constitution, over contempt proceedings, or they have only such as the legislature may see fit to confer.

"The language of this court in *Langdon* v. *Wayne Circuit Judges*, 76 Mich., 367 (43 N.W. 310) is a broad statement that this power is inherent in the circuit courts of this State to the full extent that it existed in the courts of England at the common law. This was an authoritative statement of the law, but seems not to have been so considered by the entire profession. The subject was again before the court in *Re Chadwick*, 109 Mich. 588 (67 N.W. 1070). We there cited many authorities from other courts holding the same view that was expressed in the *Langdon* case. We will not cite those authorities again, but content ourselves with this reference to them and with the citation of a few others."

The Supreme Court cited *Bradley* v. *State*, 111 GA 168, and quoted the following:

"Where a court is established by the constitution, it is given all the powers usually possessed by all courts; and we will not construe another provision of the constitution so as to take away from the court a power which is essential to its preservation, and to its accomplishment of the purposes for which it

is created, unless constrained to do so by express words or necessary implication."

"The power to punish for contempts is as ancient as the courts, and antedates Magna Charta. Chief Justice Wilmot, nearly a century and a half ago, said of this power:

" 'The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution. It is necessary incident to every court of justice, whether of record or not, to fine and imprison for contempt acted in the face of the court; and in Westminster Hall for contempts out of court stands on the same immemorial usage which supports the whole fabrice of the common law. It is as much the lex terrae and within the exception of Magna Charta, as the issuing of any other legal process whatsoever. I have examined very carefully to see if I could find out any vestiges of its introduction, but can find none. It is as ancient as any other part of the common law. There is no priority or posterity to be found about it. It cannot, therefore, be said to invade the common law. It acts in alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society.' "

The conclusion of the court in the Nichols case was that the Superior Court of Grand Rapids, even though a legislative court, possessed all of the powers of a circuit court, a constitutional court, to punish for contempt.

The Recorder's Court of the City of Detroit possesses the same powers that the Superior Court of Grand Rapids does. It has every power which circuit courts have to punish for contempt. Therefore, when the Legislature, in enacting the One Man Grand Jury law, provided for a Judge of a court of record to act as a Grand Juror, it gave such right to a court already in possession of plenary powers to punish for contempt. The Recorder's Court now has the same complete power to punish for contempt as was and is possessed by the Circuit Court for the County of Wayne.

Question Number III: Could and Did the Legislature Deprive Courts of Record of Their Inherent Powers to Punish for Contempt When a Restriction Upon Such Power was Attempted in Section 28.944 M. S. A.?

Section 28.944 M.S.A. provides in part:

> "that the Judge conducting the inquiry under *Section 4* of this Act shall be disqualified from * * * hearing any charge of contempt under Section 5 hereof, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena."

Section 5, being *Section 28.945 M.S.A.* reads as follows:

> "Same; failure of witness to appear or answer questions; penalty. Sec. 5. Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such judge may require as material to such inquiry shall be deemed guilty of a contempt and after a public hearing in open court and conviction of such contempt, shall be punished by a fine not exceeding $1,000.00 or imprisonment in the county jail not exceeding 1 year or both at the discretion of the court: Provided That if "such witness after being so sentenced shall offer to appear before such judge to purge himself of such contempt, the judge shall cause such witness to be brought before him and, after examination of such witness, the judge may in his discretion commute or suspend the further execution of such sentence."

In Michigan it has been held repeatedly from early days that the right to punish for criminal contempt is one possessed by the court independent of statute. It was said in re Dingley, 182 Mich. 50:

> "The right of the court to punish as for a criminal contempt an offender is no longer an open question in this state. The power is conferred by statute (1 Comp. Laws, Sec. 1098; 5 How. Stat. (2d. Ed.) Sec. 12589). The courts possess the power independent of the statute. Langdon v. Wayne Circuit Judges, 76 Mich. 358

43 N.W. 310); In re Chadwick, 109 Mich. 588 (67 N.W. 1071); Nichols v. Judge of Superior Court, 130 Mich. 187 (89 N.W. 691), and the many authorities therein cited. These cases are also authority for the proposition that the issue is one for the court and not one for a jury."

In People v. Doe, 226 Mich. 5, it is said at page 19:

"The objection to the power to punish for contempt is in part answered by Mundy v. McDonald, supra, but it is further insisted that the act in question makes provisions for punishment for contempt in certain cases and it is urged that this is to the exclusion of the power to punish in any other cases. The power to punish for contempt is inherent in the court. It is a part of the judicial power. It is as firmly vested in the constitutional courts by the Constitution as is the exercise of any other judicial power. *That the exercise of judicial power and all of it can not be taken away from constitutional courts by the legislature is settled.*" (Emphasis supplied)

In Cobb v. State, 200 S.E. 796 (Ga), 121 A.L.R. 210, the court said beginning on Page 213:

"The power to punish contempts is inherent in every court of record. If the court is created by the constitution, the legislature cannot, without express constitutional authority, define what are contempts, and declare that the court shall have jurisdiction over no acts except those specified. 2. The provisions of the constitution which declares that 'the power of the courts to punish for contempts shall be limited by legislative acts' does not confer such authority, but only the power to prescribe the punishment after conviction. Consequently, Section 4046 of the Civil Code, in so far as it seeks to limit the jurisdiction of a constitutional court to punish contempts to certain specified acts, is not binding upon such courts. They may go by beyond the provisions of the statute, in order to preserve and enforce their constitutional powers, by treating as contempts, acts which clearly invade them."

Then it is interesting to note that Cobb v. State approves a similar holding in Bradley v. State 111 Ga. 168, which was cited by the Supreme Court to support its similar holding in Nichols v. Superior Court of Grand Rapids, 130 Mich. 187.

The Cobb case is followed by an annotation on the power to punish for contempt. On Page 216 under "Legislative Power Denied," it is said:

> "Without attempting to cite all of the decisions in which the general declaration has been made that the power to punish for contempt is inherent in a court and exists independent of statute, it may be stated that from the cases so holding the general rule follows that the legislature cannot abridge or destroy the judicial power to punish for contempt, since a power which the legislature does not give, it cannot take away."

The foregoing is followed by numerous citations, including Chadwick 109 Mich. 588.

There being no doubt about the inability of the legislature to deprive a constitutional court of its power to punish for contempt, it follows that the provisions of Sec. 28.944, which restrict courts of record, including constitutional circuit courts, in their power to punish for contempts must be void. Since it is void as to circuit courts of record, it is void in its entirety and that includes its application to the Recorder's Court.

This is clearly illustrated in Campau v. The City of Detroit, 14 Mich. 275. Judge Cooley wrote on Page 285:

> "A single section of the act of 1865 attempts to amend all three of these; and we know of no principle which would warrant us in selecting out portions of the section to stand unaffected by the constitutional infirmity of the remainder, when all parts relate to the same subject matter, and provide the successive steps to be taken in perfecting a single proceeding. See Quinlon v. Rogers, 12 Mich. 168; Groesbeck v. Seeley, 13 ID., 329."

Again, in Hunt v. Wayne Circuit Judge, 142 Mich. 93, the supreme court was called upon to decide the constitutionality of the juvenile court act of 1905. The act extended the jurisdiction of circuit court commissioners for certain counties beyond the powers of a circuit judge at chambers as limited by the constitution. This portion of the act was palpably unconstitutional and void. The court said:

> "Satisfied of the legislative intent and purpose, can it be held that it may be disregarded, the provisions evidencing this intent eliminated, and the statute held to be for any purpose generally operative? It seems to me that every consideration forbids such a ruling. Unless the act can be held to be inoperative in counties where jurisdiction is given to probate courts and to circuit courts, it is unnecessary to discuss further the questions presented. We are obliged to say that the language of the act indicates, not only the purpose to provide for a uniform administration of the law, but for its general application in all territory not expressly excepted from its operation. Judicial power does not extend to the mutilation or amendment of the act necessary to give it any effect in any county."

The Recorder's Court Was Created by a Vote of Two-Thirds of the Members Elected to Each House of the Legislature as Required by the Constitution. The Power to Punish for Contempt Was Given in the Act. Can This Power Be Rescinded Except by a Like Two-Thirds Legislative Vote?

The Recorder's Court has been established under the provisions of Section 1 of Article 7 of the Michigan Constitution of 1908, which reads as follows:

> "Judicial power. Section 1. The judicial power shall be vested in one supreme court, circuit courts, probate courts, justices of the peace and such other courts of civil and criminal jurisdiction, inferior to the supreme court, as the legislature may establish by general law, by a two-thirds vote of the members elected to each house."

The present Recorder's Court operating under the Recorder's Court Act of 1883 supplemented by the Municipal Court Act No. 369 of 1919, was authorized by a two-thirds vote of the members elected to each house of the legislature. The Recorder's Court continued to possess all powers given to circuit courts in the State of Michigan as outlined hereinbefore. To amend or repeal the Recorder's Court Act or the Municipal Court Act would require the same vote which was necessary for their creation. No such action has ever been taken by the legislature and consequently the Recorder's Court possesses to the fullest extent the same powers as a constitutional circuit court has with respect to contempt proceedings. If those powers may be abrogated, it stands to reason it cannot be done by inserting a provision in the law, which requires a vote of a majority of a quorum of the legislature. Powers which are so precious and inherent in the administration of courts should not be destroyed or frittered away except by action equal in numerical voting requirements to that by which such powers were created.

This identical question has been before the Supreme Court of this state several times.

In Stockdale v. School District, 47 Mich. 226, a question of validity of school bonds was involved. One question was whether the school district possessed the power to take the rescinding action in question except by a two-thirds vote which was required to create the issue. The court said at page 228:

> "We think the moderator was correct in holding that a mere majority could not rescind the vote which had been required to be taken by a two-thirds vote, and had been so taken. The decree must therefore be reversed and a new decree entered, restricted as above indicated."

In Whitney v. Village of Hudson, 69 Mich. 189, the court again had before it the question of whether a city charter requiring a two-thirds vote of the members of the

common council to pass a resolution also required a two-thirds vote to reconsider or rescind the prior action. On Page 203 the Supreme Court, holding that the number required to rescind was exactly the same as the number required to pass an ordinance said:

> "It is claimed, also, by the defendants' counsel, that the vote to reconsider was not carried; that where, by statute, a vote of two-thirds is required to pass a resolution, it cannot be reconsidered or rescinded except by a two-thirds vote This was declared to be the law in the case of Stockdale v. School District, 47 Mich. 226 (10 N.W. Rep. 349), where the motion was to rescind. And, where the body has adopted no rule regulating the practice upon motions for reconsideration, it is not perceived why the same ruling should not apply.
>
> "The law requires a vote of two-thirds of the members of the body to pass the act in the shape it is in when the vote is taken. Two-thirds are satisfied with it as it then reads, and no reason exists why a majority less than two-thirds can bring the resolution again before the body for the purpose of changing its features, or postponing action. There should be some stability in legislative action which is passed under the requirements of a law calling for a vote of two-thirds of its members, and it should remain as the two-thirds have passed it, unless the same number desire a further consideration of the measure."

The same question was again before the Supreme Court in Naegely v. City of Saginaw, 213 Mich. 460. The court upheld its previous decisions, saying on Page 538:

> "Under the provisions of Section 6, tit. 3, of the charter, the resolutions authorizing the issue of bonds required a majority vote of all the members elect of the council. A corporate act which can only be taken by a majority vote of all the aldermen elect could not be rescinded except by a like vote. Stockdale v. School-District, 47 Mich. 226; Whitney v. Village of Hudson, 69 Id. 189, 202. The resolution offered by Ald. Smith received but 14 votes, and did not prevail. It is un-

> necessary, therefore, to consider the veto power of the mayor, or the validity of the action taken at the special meeting held January 31."

The same question again had the attention of the supreme court in City of Saginaw v. Consumers Power Company, 213 Mich. 460. The court said at Page 469:

> "We agree with counsel for the power company that an ordinance may not be repealed or amended without action of equal dignity to that required in its enactment. Chicago, etc., R. C. v. City of Chicago, 174 Ill. 439 (51 N.E. 596); 2 Dillon on Municipal Corporations (5th Ed.) Sec. 571."

In contending that the general, inherent, constitutional power possessed by the Recorder's Court to punish for contempts was restricted by the provisions of Sec. 28.944 M.S.A., it must be argued that the repeal is strictly one by implication. Aside from the fact that any such restriction or repeal would necessarily have to be accomplished by a two-thirds vote of both houses of the legislature elect, is it possible to accomplish such a repeal or restriction by implication only?

The Supreme Court had the question of repeal by implication before it in In Re Simmons, 248 Mich. 298. This case involved a contempt proceeding in the Recorder's Court. The precise question was whether the power to punish for contempt previously possessed by the court had been taken away by an implied repeal. Answering in the negative, the Supreme Court on page 301 said:

> "Defendant challenges the jurisdiction of the court, in that the acts charged as contempt, 'not being within the immediate view and presence of the court and directly tending to interrupt its proceedings, or to impair the respect due to its authority,' are not within the statute, 3 Comp. Laws 1915, Sec. 12268, defining contempts punishable by courts of record.
>
> "This statute is part of the judicature act (No. 314) of 1915. With only slight changes of language, it is

substantially a merger and re-enactment of two former statutes of long standing (2 Comp. Laws 1857, Sec. 4053, 4074), the criminal contempt parts of which were not designed to limit or prohibit jurisdiction but were in affirmation of the common law inherent power of courts of record. *Langdon* v. *Wayne Circuit Judges*, 76 Mich. 358. The Recorder's Court of the city of Detroit was re-established by Act No. 326, Local Acts 1883 (3 Comp. Laws 1951, Sec. 14633 et seq.). It has original and exclusive jurisdiction over certain criminal offenses committed within the corporate limits of the city, and supplants the circuit court of the county in that respect and territory. To exercise such jurisdiction, it was given the general powers of the circuit court. This included the jurisdiction in contempt possessed by the circuit court, inherent as well as statutory. *Nichols* v. *Judge of Superior Court of Grand Rapids*, 130 Mich. 187.

"Defendant, however, contends that the judicature act, being subsequent to the recorder's court act, impliedly repeals the general grant of powers in the latter as far as it applies to contempt. His position is untenable on several counts. Repeals by implication are not favored. 'Only when two acts are so incompatible that both cannot stand does the latter repeal the former'. *Highland Park* v. *McAlpine*, 117 Mich. 666. There is no such incompatibility between the acts under consideration. The recorder's court act was intermediate the original and present contempt statutes. As the latter was merely a re-enactment of the former, the recorder's court act maintains its position of qualifying the latter as it did the former. 36 Cyc. p. 1084. The judicature act was a revision of the practice. Where there is an express repealing clause in a revision, only enumerated acts are repealed unlss other legislative intent clearly appears. 36 Cyc. pp 1081, 1082. The judicature act attempted no wholesale repeal or abrogation by general language, but carefully and specifically set up the particular statutes repealed by it. Neither the recorder's court act nor any part of it is listed in the repealing clause of the judicature act. The power of the recorder's court to punish for contempt in the exercise of its criminal

jurisdiction is as necessary as that of the circuit court. The indices are that the legislature intended to leave that power intact. The court had jurisdiction."

The foregoing quotations of law clearly demonstrate that the powers given by statute to the Recorder's Court by a two-thirds vote of each house elect, cannot be withdrawn from the Recorder's Court except by a like two-thirds vote of all elect. In addition, those who argue that Sec. 28.944 M.S.A. does rescind previous necessary and essential powers of the Recorder's Court, must rely upon repeal by implication only to support their argument. On the basis of both phases of this argument, the original contempt powers of the court have been left in their previous condition unrestricted and unrescinded by the provisions of Section 28.944 M.S.A.

Even if Sections 28.944 and .945 are Valid and Binding on the Recorder's Court, They Do Not Apply to This Contempt.

Section 5 of the Grand Jury Act, being Sec. 28.945, provides that "any witness neglecting or refusing to appear in response to such summons or to answer any questions which such judge may require as material to such inquiry, shall be deemed guilty of contempt, * * *" The particular contempt with which the respondent in this matter is charged is not a refusal to answer questions but falsification of testimony in the presence of the court. This court through its inherent powers can punish such contempt. The language of the Section can have no application to the type of contempt involved in this proceeding.

Conclusion

Because the Recorder's Court has all the powers of a constitutional court to punish for contempt, and because the Recorder's Court possessed those powers when the Grand Juror was appointed, and because the Grand

Juror acts in a judicial capacity and in this contempt hearing herein did sit and act as in a judicial capacity, and because the Recorder's Court created by a two-thirds vote of each house of the legislature has been given powers inherent in constitutional courts, which powers have never in any manner been impaired, the holding of this court is that it has power to punish Lee Roy Murchison for giving false testimony before the Grand Jury. In addition to the foregoing facts, it is held that the portions of Sec. 28.944 M.S.A. which purport to deprive the court of power to try certain contempts are void, because they constitute an undue interference on the part of the legislature with the inherent power of constitutional courts to punish for contempt, which constitutional power is possessed by the Recorder's Court in like manner as constitutional circuit courts.

It is therefore held that this court has full power to cite, try and punish Lee Roy Murchison for contempt of court in giving false testimony before the Grand Juror.

JOHN P. O'HARA,
Judge of the Recorder's Court

[Filed July 6, 1954]

STATE OF MICHIGAN

SUPREME COURT

In the Matter of the Appeal of LEE ROY MURCHISON, for Contempt.

Before the Entire Bench

BOYLES, *J.*

This case is companion to *In re White*, heard herewith, both cases being appeals from sentences for contempt, on leave granted by this Court. The record here, by stipulation, consists of the application for leave to appeal, briefs,

exhibits and testimony filed here on which leave to appeal was granted. The cases mainly involve the same questions and were argued and submitted together.

Both appellants claim that Judge O'Hara, of the recorder's court, did not have the power to hear and punish for a contempt committed before him as a grand juror. That claim has been answered by the decision in the White Case, this day handed down, adversely to this appellant's contention, which now controls here.

In this case, Murchison claims that false swearing before the grand jury is not a contempt of court which can be punished as such; and that the record here does not factually support the finding that appellant swore falsely in the grand jury.

In the companion case, White was found guilty of contempt on the ground that he had refused to answer any questions before the grand juror unless his attorney was present, which demand was denied by the grand juror. In the instant case, as in the White Case, Murchison was cited to appear in recorder's court before Recorder's Judge O'Hara, the grand juror, to answer why he should not be punished for contempt in the grand jury proceeding. A hearing was held thereon in open court, after due notice, and testimony was taken. Murchison was found guilty of contempt, upon a finding that he had testified falsely before the grand jury, based upon testimony taken at said hearing. The court reporter who had taken the testimony of Murchison in the grand jury was sworn and testified in open court before Judge O'Hara on the hearing of Murchison for contempt. In the grand jury, Murchison, a policeman, had been sworn and had testified regarding the location of 945 St. Josaphats Court, and when asked how many times he had been there said none. He was asked whether he knew that 945 St. Josephats Court had been under observation for months by the police department as a headquarters for gambling, and answered, "I didn't know, because I am never down that way." In answer to the question how

many times he had gone there in January, 1954, he answered, "None," and the same answer as to having been there in March. When asked whether he denied that he was there at any time that year, he answered, "I haven't been there." He further testified that he wouldn't even know exactly where 945 St. Josaphats would be, that if they had a picture of him there it couldn't be he, and denied repeatedly that he had ever been at that place.

The testimony in the hearing for contempt was squarely to the contrary. Said place was known as a place which a so-called numbers syndicate was occupying as headquarters for conducting gambling. It was material in the grand jury proceedings to investigate whether Murchison knew of this place, was familiar with it and its use as the headquarters of a gambling syndicate; and to show any connection between the gambling syndicate and police officers. An inspector of the Detroit police department testified in the contempt proceedings that shortly after 8:40 a.m. on a certain morning in March, 1954, in company with a lieutenant of the police force, he saw Murchison at the above place. He identified Murchison, whom he had known for more than 5 years, both having been assigned to the same bureau in the police department. He further testified that a police lieutenant was there with him on said occasion and took pictures of Murchison while Murchison was on the front porch of 945 St. Josaphats. The police lieutenant testified that he took moving pictures of Murchison on that occasion and at the above place; that he had been assigned to make observations of 945 St. Josaphats Court, that he had known Murchison at least 10 years, and that he saw Murchison on that date at 945 St. Josaphats at about 8:40 a.m. He testified:

> "A. When I first saw him, he was walking east on St. Josaphats. He came to the gate, to the entrance of 945 St. Josaphats, walked up on the front porch and rang the doorbell of 945 St. Josaphats. * * * He remained on the front porch for possibly 2 minutes, and then turned and went down off the porch, walked be-

tween the houses to the rear entrance of 945 St. Josaphants, where he again pushed the buzzer. He remained there for probably about a minute and a half or 2 minutes, and turned around and walked between the houses again, to the street, where he walked west on St. Josaphats towards Hastings street out of sight. * * * I took some pictures as Patrolman Murchison stood on the front porch of 945 St. Josaphats, and then after he had come from the rear of the house and started to walk west on St. Josaphats, I took some more pictures. * * *

"Q. I will show you proposed exhibit 1, witness, and ask you whether or not that is a photograph of the identical likeness of the identical structure which you observed at that time?

"A. Yes, it is.

"Q. And is the photograph of the human subject there identical with that of anyone known to you?

"A. It is.

"Q. And who?

"A. Patrolman Lee Roy Murchison. * * *

"Q. All right. Now, I am going to show you proposed exhibit 1-A consisting of 11 photographs, and ask you the same questions with respect to them, namely, are they photographs of the physical structure at 945 St. Josaphats where you observed Lee Roy Murchison?

"A. They are.

"Q. And do you recognize the human being subject in the photograph?

"A. I do.

"Q. And who is that?

"A. Patrolman Lee Roy Murchison.

"Q. All right. And was Lee Roy Murchison in that position and at that point as observed in those photographs when you took them of him?

"A. He was."

The testimony leaves no doubt but that Murchison's testimony before the grand jury was deliberately and knowingly false. The testimony at the contempt hearing justified the finding of the recorder's court judge that Murchison had testified falsely in the grand jury.

Murchison made no claim of immunity during his testimony in the grand jury on the ground of constitutional immunity. The constitutional issue that he could not be compelled to answer without a waiver of prosecution is not involved here. He testified freely in the grand jury, and obviously falsely. Under the circumstances of this case, and the procedure followed, where a witness has been proven to have deliberately, knowingly and falsely testified before th grand jury as to facts material to the investigation there in progress, may he be sentenced for contempt; or must the judge leave the matter to a prosecution for perjury?

Doubless there are situations where such acts might be both perjury and contempt. In this case, it was proper to hold Murchison in contempt.

> "The fact that perjury is a crime for which one committing it may be tried and punished does not necessarily establish that when committed in the presence of a court it may not, when exceptional conditions so justify, be the subject matter of a punishment for contempt; the one act constituting two offenses, one against the State and the other against the court." *In re* Slattery (syllabus), 310 Mich. 458.

See, also, the prevailing opinion by Justice Fellows in People v. Doe, 226 Mich. 5, 11.

Conviction and sentence affirmed.

HENRY M. BUTZEL,
LELAND W. CARR,
GEORGE E. BUSHNELL,
EDWARD M. SHARPE,
JOHN R. DETHMERS,
HARRY F. KELLY,
Concurred with BOYLES, *J.*

NEIL E. REID,
Concurred in result

[Filed July 6, 1954]

STATE OF MICHIGAN

SUPREME COURT

In re WHITE

Before the Entire Bench.

SHARPE, *J.*

On March 16, 1954, Judge John P. O'Hara, one of the judges of the recorder's court for the city of Detroit, was selected and appointed to conduct a one-man grand jury to investigate police corruption in connection with gambling. On the following day he entered upon his duties, and the investigation commenced immediately.

In the course of the investigation, respondent, John White, was subpoenaed to testify before the grand jury on May 21, 1954 It was believed that John White possessed information regarding police corruption that would assist the grand jury in its investigation. John White was sworn as a witness and the following occurred:

"By Mr. Rashid:

"Q. Your name, witness?

"A. John J. White.

"Q. Do you have any other names or nicknames, are you known by anything else?

"A. I respectfully refuse to answer any and all questions hereafter unless my attorney is present with me here in the court from the beginning until the end.

"The Court: Your request to have your attorney here in the court room from the beginning to the end is denied, Mr. White.

"If there are any questions upon which you feel that you need the advice of your counsel, and it is done reasonably and not in such a way as to cause delays, you will be permitted to go out and talk to your attorney, but your attorney will not be permitted to be present in the court room.

"A. I still think I have that right, and I still respectfully refuse to answer any and all questions.

"* * *

"The Court: Mr. White, you have been asked where do you live. Would you answer the question?

"A. I refuse to answer.

"* * *

"Q. * * * How long have you lived in Detroit?

"A. I refuse to answer unless my attorney is here with me at all times.

"Q. Do you drive an automobile?

"A. I refuse to answer unless my attorney is here with me at all times.

"Q. What is your business?

"A. I refuse to answer unless my attorney is here with me at all times.

"Q. Do you have an interest in or do you own the Gotham Hotel?

"A. I refuse to answer unless my attorney is here with me at all times.

"Q. Are you married?

"A. I refuse to answer unless my attorney is here with me at all times.

"Q. Do you have a family?

"A. I refuse to answer unless my attorney is here with me at all times.

"Q. Do you have an attorney?

"A. I refuse to answer unless my attorney is here with me at all times.

"Q. Who is your attorney?

"A. I refuse to answer unless my attorney is here with me at all times.

"Q. Do you have a father or mother or both?

"A. I refuse to answer unless my attorney is here in court with me at all times.

"Q. Do you have any children?

"A. I refuse to answer unless my attorney is here with me at all times, from the beginning to the end.

"Q. Do you own any real estate?

"A. I refuse to answer unless my attorney is here with me at all times, from the beginning to the end.

Other questions of like import were asked of the witness and like responses made.

On May 24, 1954, an order to show cause was entered requiring John White to show cause why he should not be punished for contempt for refusal to answer any and all material questions put to him as a witness before the grand jury. The order to show cause was returnable May 28, 1954, at 9:30 a. m. On the day in question, John White appeared before John P. O'Hara, as recorder's judge, in response to the order to show cause. He was represented by counsel, and it was stipulated that the transcript of the testimony given by White on May 21, 1954, before the grand jury be admitted in evidence. Counsel for respondent entered an objection to the proceedings befor Judge O'Hara for the reason that Judge O'Hara, as recorder's judge, was disqualified from hearing a contempt of this nature and based his objections upon CLS 1952, § 767.4 (Stat Ann 1953 Cum Supp § 28.944) which provides in part:

> "Provided, That the judge conducting the inquiry under section 3 of this act shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under section 5 hereof, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena."

Judge O'Hara, as recorder's judge, overruled the objections and found respondent guilty of contempt and pronounced sentence. Upon application, leave to appeal to the Supreme Court was granted. This motion presents two questions, (1) Is a judge of the recorder's court for the city of Detroit, sitting as a judge of the recorder's court under CLS 1952, § 767.3 (Stat Ann 1953 Cum Supp § 28.943) disqualified by the provisions of CLS 1952, § 767.4 (Stat Ann 1953 Cum Supp § 28.944) from citing a witness for contempt and, thereafter, hearing the contempt pro-

ceedings himself, where the alleged contempt arose in the course of a grand jury investigation in the presence of him as the grand juror? (2) Is counsel for a witness called before a one-man grand jury entitled under CLS 1952, § 767.3 (Stat Ann 1953 Cum Supp § 28.943) to be present in the grand jury room during the testimony of his client? The answer to the first question brings into focus the status of a judge sitting as a one-man grand juror. In re Slattery, 310 Mich. 458, we held that the judge conducting a one-man grand jury proceedings is acting in a judicial capacity. Nor does the fact that the one-man grand jury is a judge of the recorder's court of the city of Detroit and not a circuit judge change his status and authority as a judge for the reason that judges of the recorder's court were granted the same power possessed by circuit judges in so far as matters relating to crimes committed in the city of Detroit are concerned. CL 1948, § 726.11 (Stat Ann § 27.3561) reads as follows:

> "The said recorder's court shall have original and exclusive jurisdiction of all prosecutions and proceedings in behalf of the people of this state, for crimes, misdemeanors, and offenses arising under the laws of this state, and committed within the corporate limits of the city of Detroit, except in cases cognizable by the police court of the city of Detroit, or by the justices of the peace of said city; and shall have power to issue all lawful writs and process, and to do all lawful acts which may be necessary and proper to carry into complete effect the powers and jurisdiction given by this act, and especially to issue all writs and process, *and to do all acts which the circuit courts of this state, within their respective jurisdictions, may, in like cases, issue and do by the laws of this state*: Provided, That this section shall not be construed to prevent the grand jury for the county of Wayne from inquiring into and presenting indictments, as heretobefore, for crimes and offenses committed within the limits of said city." (Emphasis added)

This brings us to the principal issue in the case, namely, the power of the court to punish for contempt committed in his presence as a grand juror. We held in Langdon v. Wayne Circuit Judges, 76 Mich. 358, that courts of record have inherent power to hear and determine all contempts of court which the superior courts of England had at the common law. In Nichols v. Judge of Superior Court, 130 Mich. 187 (195), we said:

> "The sound and reasonable rule of law is that, in the absence of express provision in the Constitution itself, the courts of record, established by the Constitution, are clothed by that instrument with the exclusive power over contempts, —a power which has existed from time immemorial. This rule is also established by a long line of authorities."

In People v. Doe, 226 Mich. 5 (19), we said:

> "The power to punish for contempt is inherent in the court. It is a part of the judicial power. It is as firmly vested in the constitutional courts by the Constitution as is the exercise of any other judicial power. That the exercise of the judicial power and all of it can not be taken away from constitutional courts by the legislature is settled. The question is fully considered in Nichols v. Judge of Superior Court, 130 Mich. 187. See, (also, In re Chadwick, supra, (109 Mich. 588); Carter v. Commonwealth, 96 Va. 791 (32 SE 780, 45 LRA 310); Bradley v. State, 111 Ga. 168 (36 SE 630, 50 LRA 691, 78 Am. St. Rep. 157); State v. Woodfin, 27 NC 199 (42 Am. Dec. 161); Fisher v. McDaniel, 9 Wyo. 457 (64 Pac. 1056, 87 Am. St. Rep. 971)."

We are in accord with the reasoning of the court of Arkansas as defined in State v. Morill, 16 Ark. 384. We quoted with approval from the above case in Re Chadwick, 109 Mich. 588 (599):

> "'The legislature may regulate the exercise of, but cannot abridge, the express or necessarily implied powers granted to this court by the Constitution. If it

could, it might encroach upon both the judicial and executive departments, and draw to itself all the powers of government, and thereby destroy that admirable system of checks and balances to be found in the organic framework of both the Federal and State institutions, and a favorite theory in the governments of the American people. As far as the act in question goes, in sanctioning the power of the courts to punish as contempts the 'acts' therein enumerated, it is merely declaratory of what the law was before its passage. The prohibitory feature of the act can be regarded as nothing more than the expression of a judicial opinion by the legislature that the courts may exercise and enforce all their constitutional powers, and answer all the useful purposes of their creation, without the necessity of punishing as a contempt any matter not enumerated in the act. As such, it is entitled to great respect; but to say that it is absolutely binding upon the courts would be to concede that the courts have no constitutional and inherent power to punish any class of contempts, but that the whole subject is under the control of the legislative department; because, if the general assembly may deprive the courts of power to punish one class of contempts, it may go the whole length, and divest them of power to punish any contempt.'"

In Bielecki v. United Trucking Service, 247 Mich. 661, 666, and Attorney General v. O'Neill, 280 Mich. 649, 657, the Court quotes with approval from Kiley v. Chicago, M. & St. P. R. Co., 138 Wis. 215, 226 (119 NW 309, 120 NW 756), and Thoe v. Chicago, M. & St. P. R. Co., 181 Wis. 456, 462, 466 (195 NW 407, 29 ALR 1280):

"'The powers of the court and jury in the administration of the law in these respects were distinct and well defined at the time of the adoption of our Constitution and became vested in the court and jury by its provisions. They cannot be abrogated or modified by legislative action to the extent of impairing, in any degree, the judicial power. Under the Constitution courts have become vested with the judicial power to determine the questions of the legal sufficiency of the

evidence to establish the rights of the parties at issue and to apply the law to the facts when found, and this power cannot be withdrawn from them and conferred on juries.' * * *

"'The people of the State of Wisconsin, through the Constitution ordained by them, have conferred upon the courts of this State the judicial power, which includes the power finally to construe, interpret, and apply the law in private as well as public matters. The Constitution having confided this high prerogative to the courts, they would be plainly derelict in their duty if upon any pretense whatever they permitted the powers so confided to them to be exercised by other than judicial officers.'"

Article VII, Section 1, Michigan Constitution of 1908 provides that the judicial power shall be vested in the courts therein enumerated "and such other courts of civil and criminal jurisdiction, inferior to the supreme court, as the legislature may establish by general law." When the legislature, by the enactment of CL 1948, § 726.1 et seq. (Stat. Ann. § 27.3551 et seq.) provided for the recorder's court of the city of Detroit, it acted in the exercise of that constitutionally conferred power to establish "other courts." Having acted thus, the court so created under constitutional authority and provision, became a constitutional court of record, possessed of the inherent powers appertaining thereto, equally as in the case of the circuit and other courts enumerated in the constitution. It follows that the legislature has no power to deprive a constitutional court, such as a circuit court, of its power to punish for contempt committed in its presence. And, inasmuch as the recorder's court of the city of Detroit possesses all the powers given circuit courts in the State of Michigan, "and to do all acts which the circuit courts of this state, within their respective jurisdictions, may, *in like cases*, issue and do by the laws of this state," it also follows that the legislature has no power to deprive a judge of the recorder's court of its power to punish for con-

tempt committed in its presence. The conclusion is inevitable that when the legislature enacted CLS 1952, § 767.4 (Stat. Ann. 1953 Cum. Supp. § 28.944) in which it attempted to disqualify the grand juror from hearing a charge of contempt arising under CLS 1952, § 767.5 (Stat. Ann. 1953 Cum. Supp. § 28.945) it acted unconstitutionally and exceeded its powers in so doing.

It is also contended by respondent that a witness called before the grand jury is entitled to have his counsel present in the court room at the time the witness testifies before the grand jury. This claim arises out of CLS 1952, § 767.3 (Stat. Ann. 1953 Cum. Supp. § 28.943) which provides:

> "* * * Any person called before the grand jury shall at all times be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt. * * *"

Judge O'Hara, the grand juror, interpreted the act in question to mean that a witness might consult with legal counsel, but did not intend that a witness had the right to have his lawyer sit in the court room while the witness was testifying In coming to our conclusion upon this issue we take into consideration that a witness before a grand jury is not on trial for any offense and that secrecy is a paramount adjunct of a grand jury. In People v. Lauder, 82 Mich. 109, it was held that a witness testifying before a grand jury had no right to have the assistance of counsel.

We do not think that the legislature intended, in enacting the above act, that a witness not on trial for any offense was entitled to have an attorney at his elbow to advise him whether or not he should answer a question put to him. We are of the opinion that the legislature intended that a witness was entitled to have legal counsel before or after being subpoenaed and prior to his being called as a witness, or at such other times in the discretion of the grand juror. We hold that a witness legally called to

testify before a grand jury is not entitled to have an attorney with him when he is so testifying. There being competent evidence to sustain the conviction, the judgment is affirmed.

HENRY M. BUTZEL,
LELAND W. CARR,
GEORGE E. BUSHNELL,
EMERSON R. BOYLES,
JOHN R. DETHMERS,
HARRY F. KELLY,
Concurred with SHARPE, *J.*

NEIL E. REID,
Concurred in result

STATE OF MICHIGAN

SUPREME COURT

No. ....

In Re LEE ROY MURCHISON and JOHN WHITE, *Respondents*

Stipulation

It is hereby stipulated by and between Gerald K. O'Brien, Prosecuting Attorney for the County of Wayne, and Charles W. Jones, William L. Colden and George Stone, of counsel, representing Lee Roy Murchison and John White, respondents in the above-captioned matters, as follows:

1. That the application for leave to appeal, and the matters thereto appended, constitute the entire record that would be filed in this court if the applications were granted and records were then filed in pursuance thereof;

2. That the applications shall be noticed for hearing in the Supreme Court for Tuesday, the 8th day of June, 1954;

3. That if the Supreme Court will agree thereto, the applications and appendices may be treated as records on ap-

peal; that the two matters may be consolidated and be treated as one case on appeal; that the consolidated case may be considered as regularly upon the June, 1954 docket of the court; that the consolidated case may be orally argued before the court on Tuesday, June 15th, 1954, or as soon thereafter as the convenience of the court will permit; that the opinion of the court thereon shall in all respects be binding on all the parties in like manner as if the case had been regularly entered on the June, 1954 docket of the court.

FRANK G. MILLARD,
Attorney General,
State of Michigan

GERALD K. O'BRIEN,
Prosecuting Attorney,
County of Wayne

SAMUEL J. TORINA and
JOSEPH G. RASHID,
Assistant Prosecuting
Attorneys

CHARLES W. JONES,
WILLIAM L. COLDEN,
GEORGE STONE,
Of Counsel,
Attorneys for
Respondents

By

June 5, 1954

STATE OF MICHIGAN

IN THE SUPREME COURT

No. . . .

In Re: Lee Roy Murchison, *Petitioner.*

Application for Leave to Appeal

The above named petitioner, Lee Roy Murchinson, respectfully shows unto the Court as follows:

1. That he is a resident of the City of Detroit, Wayne County, Michigan and for some years past has been a member of the Police Force of said City of Detroit.

2. That for some months prior hereto there has been pending in the Recorder's Court for the City of Detroit a so-called Grand Jury investigation under Sections 28.941 et seq. M.S.A. as amended, and that the Honorable John P. O'Hara, Judge of said Recorder's Court has been the so-called one man grand juror in charge of such proceedings.

3. That petitioner was subpoenaed before such grand jury and required to testify before it with respect to certain matters.

4. That thereafter on May 6, 1954, Judge O'Hara, as the one man grand juror, issued an order requiring petitioner to show cause why he should not be "punished for criminal contempt of this court" because he had testified falsely before it.

5. That after a hearing on said order to show cause before Judge O'Hara, petitioner was found guilty on May 14, 1954 of contempt of court and sentenced to be confined in the Wayne County Jail for a period of 60 days.

6. The petitioner has been released on bail fixed by Judge O'Hara pending the outcome of this application for leave to appeal.

7. That petitioner believes he was wrongfully and erroneously convicted, that prejudicial error was committed by the trial court in his conviction, and that the proceedings before Judge O'Hara are unconstitutional and void, and that the reasons and grounds for his appeal are as follows:

(a) The so-called one-man grand jury statute, sections 28.941, et seq., M.S.A., constitutes an unlawful delegation of legislative and executive functions to a judicial officers in violation of Article IV of the Constitution of 1908 of Michigan.

(b) The one-man grand jury statute deprives persons of their liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(c) The one-man grand jury statute deprives persons called before it to testify of the right to have counsel with them in violation of the Constitution of the United States and the Constitution of the State of Michigan.

(d) The contempt hearing before the same judge who is at the same time the complainant, indicter, and prosecutor constitutes a denial of due process of law and of the fair and impartial trial required by the Fourteenth Amendment to the Constitution of the United States.

(e) The contempt hearing before Judge O'Hara is in violation of both the letter and the spirit of the one-man grand jury statute, particularly sections 28.944 and 28.945, M. S. A., as amended by Act 276, P. A. 1951.

(f) The procedure adopted by Judge O'Hara denies to petitioner the rights of a criminal trial, including the right to a trial by jury.

(g) The allegedly false swearing before Judge O'Hara, while it might subject petitioner to a charge of perjury, does not constitute contempt of court.

8. That in support of this application there is attached hereto a concise statement of the proceedings and facts in the court below so far as material to this application.

Petitioner therefore prays that this court grant him leave to appeal from the judgment and sentence of Judge O'Hara finding are unconstitutional and void, and that the reasons and grounds for his appeal are as follows:

(a) The so-called one-man grand jury statute, sections 28.941, et seq., M.S.A., constitutes an unlawful delegation of legislative and executive functions to a judicial officers in violation of Article IV of the Constitution of 1908 of Michigan.

(b) The one-man grand jury statute deprives persons of their liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(c) The one-man grand jury statute deprives persons called before it to testify of the right to have counsel with them in violation of the Constitution of the United States and the Constitution of the State of Michigan.

(d) The contempt hearing before the same judge who is at the same time the complainant, indicter, and prosecutor constitutes a denial of due process of law and of the fair and impartial trial required by the Fourteenth Amendment to the Constitution of the United States.

(e) The contempt hearing before Judge O'Hara is in violation of both the letter and the spirit of the one-man grand jury statute, particularly sections 28.944 and 28.945, M.S.A., as amended by Act 276, P.A. 1951.

(f) The procedure adopted by Judge O'Hara denies to petitioner the rights of a criminal trial, including the right to a trial by jury. 109, J. 88, p. 597, 598, People v. Doe, 226, 5-18.

8. That in support of this application there is attached hereto a concise statement of the proceedings and facts in the court below so far as material to this application.

Petitioner therefore prays that this court grant him leave to appeal from the judgment and sentence of Judge O'Hara finding him guilty of contempt of court and ordering him confined in the Wayne County Jail for 60 days, that the errors aforesaid may be corrected and a proper judgment entered in accordance with his lawful rights.

———, Petitioner.

James Jackson, Sr.,
William L. Colden and
George Stone,
Attorneys for Petitioner
By: George Stone
2550 Guardian Bldg.
Detroit 26, Michigan
WO. 1-5364

State of Michigan,
County of Wayne, ss.

Lee Roy Murchinson, being first duly sworn, did depose and say that he has read the foregoing petition by him subscribed, and that the same is true of his own knowledge and belief, except as to matters therein stated to be upon information and belief, and as to those matters he believes them to be true.

Subscribed and sworn to before me this .... day of May, 1954.

Notary Public, Wayne County, Michigan
My commission expires: ——

STATE OF MICHIGAN

IN THE SUPREME COURT

No. ....

In Re JOHN WHITE, *Petitioner*

Application for Leave to Appeal

That the above named petitioner, John White, respectfully shows unto the Court as follows:

(1) That he is a resident of the City of Detroit, County of Wayne and State of Michigan, and has been such a resident for the past fifteen (15) years and upwards.

(2) That for some months prior hereto there has been pending in the Recorder's Court for the City of Detroit a so-called Grand Jury investigation under Sections 28.941 et seq. M. S. A. as amended, and that the Honorable John P. O'Hara, Judge of said Recorder's Court has been the so-called one man grand juror in charge of such proceedings.

(3) That petitioner was subpoenaed before such grand jury and required to testify before it with respect to certain matters.

(4) That thereafter on May 24, 1954, Judge O'Hara, as the one man grand juror, issued an order requiring petitioner to show cause why he should not "be punished for criminal contempt of this Court" because he refused "to answer any and all material questions put to him by this Court and the Assistant Prosecutor assigned to this judicial inquiry until and unless his attorney was present in the Courtroom during and throughout the entire interrogation of the witness" and further that he refused "to answer some material questions put to him by this Court in the course of the judicial conduct by it without stating any reason for his refusal to answer."

(5) That after a hearing on said Order to Show Cause before the Honorable Judge O'Hara on the 28th day of May, 1954, this petitioner was found guilty of contempt of Court and sentenced to be confined in the Detroit House of Correction for a period of Ninety (90) days and assessed a fine in the amount of Two Hundred Fifty ($250.00) Dollars.

(6) That petitioner has been released on bail fixed by Judge O'Hara pending the outcome of this application for leave to appeal.

(7) Tht petitioner believes he was wrongfully and erroneously convicted, that prejudicial error was committed by the trial court in his conviction, and that the proceedings before Judge O'Hara are unconstitutional and void, and that the reasons and grounds for his appeal are as follows:

(a) The so-called one-man grand jury statute, sections 28.941, et seq., M.S.A., constitutes an unlawful delegation of legislative and executive functions to judicial officers in violation of Article IV of the Constitution of 1908 of Michigan.

(b) The one-man grand jury statute deprives persons of their liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(c) The one-man grand jury statute deprives persons called before it to testify of the right to have counsel with them in violation of the Constitution of the United States Constitution of the State of Michigan.

(d) The contempt hearing before the same judge who is at the same time the complainant, indicter, and prosecutor constitutes a denial of due process of law and of the fair and impartial trial required by the Fourteenth Amendment to the Constitution of the United States.

(e) The contempt hearing before Judge O'Hara is in violation of both the letter and the spirit of the one-man grand jury statute, particularly sections 28.944 and 28.945, M.S.A., as amended by Act 276, P. A. 1951.

(f) The procedure adopted by Judge O'Hara denies to petitioner the rights of a criminal trial, including the right to a trial by jury.

(g) The statute creating the so called one-man grand jury merely conferred upon the Judge conducting the inquiry the powers of an investigator and or inquisitor, and as such investigator and or inquisitor he is not acting in a judicial capacity and hence is deprived of the power inherent in the Court as a judicial officer except to those powers expressly granted by the statute hereinbefore set forth.

(h) That the right to have counsel as provided by the statute entitles the petitioner herein to the usual services rendered by an attorney and counselor, including the right to have such representation at all times during the inquiry.

(i) That the court errored in commenting on the attitude of the petitioner herein during his appearance before the Honorable John P. O'Hara in his capacity as the so called one-man grand jury, and specifically the refusal after motion expunge said remarks from the records.

(8) That in support of this application there is attached hereto a concise statement of the proceedings and facts in the Court below so far as material to this application.

Petitioner therefore prays that this court grant him leave to appeal from the judgment and sentence of Judge O'Hara finding him guilty of contempt of court and ordering him confined to the Detroit House of Correction for

Ninety (90) days and assessed the fine of Two Hundred Fifty ($250.00) Dollars.

.....

Petitioner

Loomis, Jones & Colden
By: William L. Colden
LOOMIS, JONES & COLDEN,
CHARLES W. JONES,
WILLIAM L. COLDEN,
and GEORGE STONE,
Counsel-Attorneys for Petitioner
1308 Broadway - Suite 505
Detroit 26, Michigan
WO. 2-3275

STATE OF MICHIGAN,
COUNTY OF WAYNE, ss.

JOHN WHITE, being first duly sworn, did depose and say that he has read the foregoing petition by him subscribed, and that the same is true of his own knowledge and belief, and as to those matters he believes them to be true.

.....

Subscribed and sworn to before me this 7th day of June, A. D. 1954.
Edith E. Jones
Notary Public, Wayne County, Michigan
My Commission Expires: August 12, 1955